Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1092

WINTHROP DRAKE THIES,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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October Term, 1977

No. _____

WINTHROP DRAKE THIES,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Winthrop Drake Thies, respectfully prays that a writ of certiorari be granted to review the judgment order of the Court of Appeals for the Third Circuit, entered in this proceeding on December 5, 1977.

Opinion Below

The court of appeals rendered no opinion in affirming the judgment of the district court. No opinion was written by the district court. A copy of the judgment order of the court of appeals reciting the issues considered by it is annexed as Appendix A.

Jurisdiction

The judgment order of the court of appeals was entered December 5, 1977. On January 4, 1978, Mr. Justice

Brennan extended the time within which to file a petition in this case to and including February 3, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether federal agents are acting within the scope of their official duties, and hence are entitled to the protection of 28 U.S.C. §111 when they continue forcibly to restrain a citizen immediately after a United States magistrate has ruled, in their presence and quite audibly, that the government had not shown probable cause for his arrest.

2. Whether a citizen should be penalized under 28 U.S.C. §111 for resisting a patently illegal arrest, or is the criminal element in such resistance reduced, if not removed entirely, on the theory that a free man ought not be penalized for resisting officious, arbitrary assertions of authority.

3. Whether, if this Court's decision in *John Bad Elk v. United States,* 177 U.S. 529 (1900) is overruled, the new law should be applied prospectively only.

Statutory Provisions Involved

Section 111. Assaulting, resisting, or impeding certain officers or employees.--Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (June 25, 1948, c. 645, § 1, 62 Stat. 688.)

Statement of the Case

(a) Historical Facts

Petitioner, an attorney, was convicted of one count of forcibly assaulting, resisting, etc. a federal officer engaged in performance of his official duties (28 U.S.C. §111), after jury trial in the United States District Court for the District of New Jersey. He was fined $500.00 as a result of this felony conviction.

The government proved that following a two-week FBI investigation, monitored on a daily basis by two Assistant United States Attorneys, petitioner was arrested without a warrant for selling certain bonds in violation of 18 U.S.C. §2315. This field arrest proceeded peaceably (T.263).[1] Petitioner was taken to FBI headquarters and waited there for about five hours before he was taken before a magistrate. He was neither handcuffed nor held in a detention cell during this time.

After the magistrate read the complaint, he ruled:

> "The complaint as it's drafted in the court's opinion is insufficient to state probable cause. I will not sign this document as it is prepared. You may present it upon amending it in such a way as to establish probable cause to believe that this was claimed" (A.55).

Petitioner stated that he would assume by the court's declining to sign the complaint "believing for the while it fails to state a sufficient cause of action, that accordingly, I'm discharged from the arrest of the FBI and that they must return to me the property that they took from me" (A.56-57).[2]

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[1] Out of the necessity of limiting petitioner's costs, the "T" references are to the trial record, and the "A" references are to the petitioner's appendix filed with the court of appeals below.

[2] The proceedings before the magistrate were recorded and the recording was played to the jury.

The magistrate testified that when petitioner so stated, he was not asking a question (A.65-66). The magistrate did not respond by informing petitioner he was still under arrest or not free to leave (A.69). His response was to state that he did not know the circumstances of the petitioner's appearance; by telling petitioner the Government could file a complaint at any time; and by repeating that he was not satisfied with the probable cause showing in the complaint (A.57). The colloquy ended in this fashion:

> "[The Magistrate]: Now, if the Government has taken property from you and has arrested you, you should know what your recourses are as an attorney admitted to practice in the State of New York. You appear here under arrest?
>
> [The Petitioner]: Allegedly so. A man said I arrest you. I do not believe he witnessed any offense. I believe the arrest was unlawful.
>
> [The Magistrate]: Well then, you have your recourse. I can only suggest to you, sir, that the rejection of this complaint in its present form does not constitute jeopardy.
>
> [The Petitioner]: Thank you, I appreciate that, your Honor" (A.77).

After the Magistrate's proceeding terminated, petitioner stated he was leaving and walked out of the courtroom (A.57-58; A.73). An assistant United States Attorney stated to FBI agents "in substance that [petitioner] is still in custody; he is not free to leave" (A.58-59). The assistant admitted he did not convey this information to petitioner nor did he ask petitioner not to leave the courtroom (A.70).

Agent Boyd was "alarmed"[3] by petitioner's announcement he was leaving; called to the other agents to stop him; and rapidly followed petitioner out the door (A.73). Boyd later testified he believed petitioner thought he had a right to walk out of the courtroom (A.89).

Boyd, an attorney, also testified that even though the Magistrate held there was no probable cause to believe a crime was committed, he restrained the petitioner because he was:

> "satisfied, to my way of thinking, that a crime had been committed...Now because a piece of paper, which has not been signed...Because a piece of paper, which has no legal import...until it is sworn to and signed, left out some facts which I knew to have occurred, and because out of an omission in preparation of the piece of paper, to someone's satisfaction, this piece of paper did not outline what subjectively the reader thought to be probable cause, then the same set of facts that caused me to believe you [addressing petitioner] were under arrest, at the moment the bonds and money changed hands, still existed. Therefore, you were still under arrest" (A.85-86).

Boyd reached petitioner first; put his hands on petitioner's shoulders to stop him, and stated he was still under arrest; to be seated because he was still being

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[3] The reason for Boyd's alarm was explored by cross. Boyd admitted he knew petitioner's address and phone number, but was not permitted to answer whether he knew petitioner had substantial roots in the community (T.395). He was permitted to testify only that he never considered letting petitioner leave and securing an arrest warrant after a complaint was filed, though Boyd was aware of this alternative. He did not consider it because "I felt you [addressing petitioner] were still under arrest, and in my custody, and that you were leaving my custody without proper authority" (A.90-91).

detained (A.75). When Boyd said this, the petitioner, though plainly irritated, walked to the bench with him (A.74).

Two other FBI agents joined Boyd and petitioner, making a semi-circle around the bench. All of the agents testified that petitioner repeatedly insisted that he was free to go on account of the magistrate's ruling (A.74, 76, 110, 62, 97, 113).

The two Assistant United States Attorneys assigned to the case walked over to the bench to see what was going on (A.61). According to one assistant, "When Mr. Thies saw Mr. Razzano and myself, he called out to Mr. Razzano by name, and also said something about this not being Nazi Germany" (A.62). Petitioner testified that he told the agents that Razzano would "come over and straighten things out. He's a law enforcement officer" (T.8). After hearing petitioner's call for help, the assistants "walked back around the corner and continued examining the complaint" (A.62).

After this, things heated up. Petitioner again reiterated that he was not under arrest and was leaving the courthouse (A.99). Boyd, standing between petitioner and the elevators, put his hands near petitioner's shoulders, gesturing to him to stop--"at which point Mr. Thies pushed agent Boyd" (A.99, 113). Boyd then "engulfed" petitioner with his arms and petitioner began throwing punches, managing to hit Boyd once or twice on the back of the head (A.99). Two other agents and a United States marshal closed in to restrain petitioner. The struggling continued until petitioner was handcuffed (A.79.)

Petitioner was again put on the bench, where he proceeded to protest vigorously "about being falsely arrested, rights being denied, that the FBI doesn't play by the rules..." (A.81-82). Two newspaper reporters were near-

by and the marshal suggested moving petitioner to the lock-up, in order to "save a whole lot of disturbing embarrassment..." (A.121). The agents took hold of him and, according to the marshal, "...naturally he resisted us again and the struggle started."

> "Q: Tell us exactly what he did, if you recall.
> A: Kicking. He couldn't throw any punches this time because he was cuffed.
>
> Q: Do you recall whether he directed any of his attention toward any one person at that time?
> A: The newspaper reporters.
>
> Q: No comments. [sic] I'm talking about his actions in kicking and thrashing; anything like that.
> A: He was just trying to break free" (A.122).

The petitioner was subdued rather quickly at this point and left the hallway in the agents' custody.

As a result of petitioner's resistance, one agent sustained minor scratches on his thumb; bruised knees and arm; and a stiff neck and back (T.349). The marshal testified he "got kicked in the shin, a little broken skin. Nothing to worry about" (A.122-23). The petitioner was indicted for resisting, assaulting, etc. three FBI agents and one United States marshal in the performance of their official duties--a federal felony and hence an offense for which he is automatically subjected to disbarment under New York law.[4]

(b) Legal rulings

The district court below ruled that once petitioner was brought before the magistrate, "law enforcement custody" terminated and petitioner was "in the custody of

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[4] *Matter of Chu*, 42 N.Y.2d 490 (1976); see also, *Matter of Troy*, N.Y.L.J., Jan 23, 1978, p. 1, col. 4.

the Court at the Court's disposition" (A.146). The court held:

> "The authority of [the] Magistrate to proceed further in your case ceased upon his rejection of the complaint; and since custody had theretofore been transferred from law enforcement personnel to the court, and since [the Magistrate's] authority...to act further in your case ceased, there was...no legitimate and legal restraint upon you as soon as Judge Hunt determined that the complaint was insufficient for filing" (A.147).[5]

Despite this ruling, the court permitted the government to introduce virtually all the evidence it had on the bond case arrest--first, on the theory that it was relevant to establish probable cause for a valid second arrest under 18 U.S.C. §3052; and later, when the proof failed to establish that a rearrest occurred, on the theory that the government was entitled to prove that the agents, while operating under a mistake of law, were nonetheless acting in good faith (A.143-44; 154). Petitioner objected to all such rulings on the ground that the evidence was irrelevant and highly prejudicial (A.30, 149, 152-53b, 155-56, 162).

Proof came in not only that petitioner sold the allegedly worthless bonds to a buyer who had knowledge

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[5] The court later stated:

"...Judge Hunt had no authority to go any further with the case...Mr. Thies, if he wasn't subject to the order of the court...was subject to no restraint or custody at all, because the Government had...asked Judge Hunt to exercise judicial authority...[and] Judge Hunt found there was no basis for exercising such judicial authority...Mr. Thies, in my judgment, was then free to go...The contention by everybody from the Assistant United States Attorney...on through all the FBI agents involved was to assert a continuing custody over Mr. Thies, which I find the Government legally had no right to assert" (A.188-89).

of this fact, but as to the hearsay facts establishing the government's collective belief that the bonds were unlawfully converted; that they had moved in interstate commerce; and that petitioner had guilty knowledge (See A.171-73). Tapes of many hours of conversations concerning the sale of the bonds were played to the jury. They also heard abundant hearsay evidence on field investigations, not involving petitioner, in some 30 FBI officers over a ten-year period (A.169-173).[6]

The petitioner submitted two requests for jury instructions,[7] both of which were denied (A.158-159). He also excepted to the court's failure to charge in accordance with these instructions (A.43).

Petitioner's motions to dismiss were also denied. The court ruled that a citizen has no right whatsoever to resist an officer acting illegally, but under a subjective good faith belief he had probable cause (A.158). Petitioner objected that this was not "the state of the law" (A.159).

While the court reaffirmed its prior ruling that petitioner's detention after the magistrate's discharge was

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[6] Petitioner's subsequent conviction on the bond charge was vacated by the Third Circuit on January 23, 1978, on the ground that the government failed to establish petitioner was guilty of a federal crime. The order of the court is annexed as Appendix B.

[7] "*Request No. 7:* Federal officers are not acting within the scope of their authority if they commit an illegal arrest while it is transparent to them, or the jury believes, that they should have known that the arrest was illegal" (A.8).

"*Request No. 8:* Although the law in New Jersey is different, I charge you that under the Federal law involved with this statute Mr. Thies is charged with violating, if Mr. Thies was being illegally impeded he was entitled to use reasonable force to repell such illegal invasion of his rights" (A.9).

illegal,[8] it refused to dismiss or to charge, pursuant to petitioner's requests 7 and 8 (*supra,* p. 9, n. 7) on the ground that:

> "'...I know there are some old cases and you cited them: *Dire* [sic] and *John Bad Elk*,[9] which would indicate you have a right to resist an invalid arrest. I don't go along with those cases. I think the Circuit Court decisions have adequately distinguished them.
> "I think they are *passé*" (A.196-97).

Before the jury retired, petitioner also requested an instruction that the court's ruling amounted to a "judicial *ex post facto* pronouncement and [petitioner] should be judged by *John Bad Elk* on the statement therein [of] a right to resist an illegal arrest" (T.630). The court refused, ruling that a Third Circuit opinion[10] "leaves me free to select what I believe is the better rule" (T.631).

After the court's charge, the petitioner took exception in accordance with his trial position on the right to resist issue (A.43). A post-verdict Rule 29 (F.R.Cr.P.) motion was also made reiterating petitioner's argument that the right to resist rule was:

> "Not to encourage a defendant to engage in... fisticuffs...with an armed constabulary today, but rather to excuse a defendant who, pushed by law officers, and in the emotion of the moment, gives way..." (A.225).

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[8] "...I don't think you can stand there and tell a defendant the Government has then not met its obligation to show probable cause in the complaint, the rules require it to file forthwith, and then continue this defendant in custody for the convenience of the Government to get its paperwork straightened out, paperwork it should have had enough capacity to have completed properly prior to going to court" (A.186-187).

[9] *United States v. DiRe,* 332 U.S. 581 (1948), and *John Bad Elk v. United States,* 177 U.S. 529 (1900).

[10] *United States v. Ferrone,* 438 F.2d 381 (3rd Cir. 1971).

Before pronouncing sentence, the court observed:

> "The Government was wrong in this case... partly to blame. They egged this man on...I am not stating that Mr. Thies was in the right. A jury found he wasn't...I am sinply saying that the Government is not entirely free from blame in the precipitation of this case, and...of this altercation that led to this case" (A.223-24).

In sentencing, the court imposed a $500 fine as it felt this was "sufficient punishment for Mr. Thies's fit of pique and temper in the hallway of this courthouse..." (A.226).

Reasons for Granting the Writ

1.

Section 111 Has Not Been Interpreted by This Court on the Issue Presented Herein, and the Circuit Court Cases Interpreting It Are Confusing and Contradictory

This Court has never decided whether, in enacting Section 111, the Congress intended to protect government agents from the foreseeable consequences of their own illegal, provocative acts; or intended to preclude a citizen from interposing the traditional common law defense of provocation[11] in such a case. Definitive interpretation is necessary because of the considerable conflict in the circuits on how to strike a reasonable balance between the citizen's right to liberty from arbitrary, officious governmental interference with his person, and the government's need to protect its agents from unprovoked physical violence.

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[11] See Chevigny, "The Right to Resist an Unlawful Arrest," 78 Yale L.Rev. 1128, 1130-32 (1969), and see p. 13, n. 12-13, *infra.*

Some circuit court cases have held or stated in *obiter dicta,* that where a federal officer knows or should know that his conduct is illegal, then he is not entitled to the protection of Section 111. *Whipp v. United States,* 47 F.2d 496 (6th Cir. 1931); *United States v. Kartman,* 417 F.2d 893 (9th Cir. 1969); *United States v. Reid,* 517 F.2d 953, 962 (2nd Cir. 1975); *United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969) (by implication). A few other cases have so held but not in the context of Section 111. See especially Judge Friendley's opinion in *United States v. Edmons,* 432 F.2d 577 at 483-85 (2nd Cir. 1970) and Mr. Justice Stevens' opinion in *United States v. Holmes,* 452 F.2d 249 at 260-61 (7th Cir. 1971).

Other courts have taken the position that a federal officer is protected by Section 111 without regard to the legality or illegality of his actions, as long as he is not on a frolic of his own. See, for example, *United States v. Velardo,* 528 F.2d 387 (9th Cir. 1975); *United States v. Cunningham,* 509 F.2d 961 (DC Cir. 1975); *United States v. Cho Po Sun,* 409 F.2d 489 (2nd Cir. 1969); and *United States v. Ferrone, supra,* 438 F.2d at 387-389.

In *United States v. Feola,* 420 U.S. 671, 686 (1975), where Section 111 was construed, the Court did not address the question presented, noting only that where an officer's identity was unknown to the defendant, then "...one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." Here, the petitioner conceded he knew the officers' identities, but maintained that despite this knowledge, the agents were not protected by Section 111 because they should have known that their

conduct in detaining him after the magistrate's discharge was illegal.[12]

The question of statutory interpretation here presented is one that arises in a substantial number of cases decided in the courts each year. Each court puts a different gloss upon the words of the statute resulting in a preplexing maze of opinions which employ identical terminology but which imports to it different, and often contradictory meanings.

The statutory interpretation issue is sufficient significance to warrant granting the petition for the writ in this case.

2.

If the Court's Decision in *John Bad Elk, supra,* Is to Be Overruled, Then the Overruling Decision Should Come from This Court, Not from a District Court Judge at Trial or Even from a Court of Appeals Sub Silencio

While many lower court decisions characterize *John Bad Elk, supra,* as recognizing the common law right[13] to resist illegal arrest in *dicta* only, that decision, in fact,

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[12] Agent Boyd--the only agent whom petitioner was convicted of resisting--not only was in the courtroom when the magistrate ruled on probable cause, but also was an attorney. That the continued detention or arrest after the magistrate's discharge is illegal is well established. See, *Carlson v. Landon,* 342 U.S. 524, 546-57 (1952); *United States v. Holmes, supra,* 452 F.2d at 261; and c.p. *Gerstein v. Pugh,* 420 U.S. 103 (1975).

[13] The common law distinguished cases with mere technical defects in the arrest, from those involving a patently unlawful arrest of such provocation that the criminal element in one's resistance was "reduced, if not removed entirely". In the first situation, resistance was not justified "for the officer must at his peril pay obedience" to presumptively valid legal process. In the second, English courts held that patently unlawful arrests were "simply arbitrary assertions of authority", and that "a free man should not be penalized for resisting such affronts." *Chevigny, supra,* 78 Yale L.Rev. at 1130-32.

turns solely upon the doctrine. The Court reversed the conviction on the ground that the trial court committed prejudicial error when it refused petitioner's request to charge that, if the arrest were illegal, then he had the right to use such reasonable force as a prudent man might employ in the same circumstances (177 U.S. at 533).

The common law right was reaffirmed in *dicta* in *United States v. DiRe,* 332 U.S. 581, 594-95 (1948). In *Wainwright v. New Orleans,* 392 U.S. 598 (1967), the Court declined to decide whether a state court defendant had a federal constitutional right to resist an illegal arrest as the record was "too opaque to permit satisfactory adjudication" of this issue.

If the common law right which the Court recognized, reaffirmed and applied in *John Bad Elk, supra,* is to be discarded, then the decision to discard it should be made by this Court and not because a lower federal court believes the decision is "passé." *United States v. Karanthanos,* 531 F.2d 26, 31 (2nd Cir. 1976), and *Houchins v. Sheriff of the County of Alameda,* 50 L.Ed.2d 733 (1977) (opinion of Mr. Justice Rehnquist in chambers).

For this further reason, certiorari should be granted in this case.

3.

If the *John Bad Elk, supra,* Was Properly Overruled by the District Court, Then the Ruling Below on Retroactivity Conflicts with a Recent Decision of the Court

In *Marks v. United States,* - U.S. - , 51 L.Ed.2d 260, 265 (1977), the Court held that the principle upon which the Ex Post Facto Clause is based applies to the judicial branch as "...the notion that persons have a right to fair warning of that conduct which will give rise to criminal

penalties--is fundamental to our concept of constitutional liberty." See also, *State v. Koonce,* 214 A.2d 428, 436-37 (N.J.App.Div. 1965), holding that New Jersey's abolition of the right to resist rule should be applied prospectively only.

In this case, petitioner requested an instruction in line with the subsequent holding in *Marks, supra.* Moreover, it is clear that the district court below did not simply clarify the prior law, but discarded it. *Cf. Marks, supra,* 51 L.Ed.2d at 267.

Even if the courts below correctly held that *John Bad Elk, supra,* should be overruled, the Court should decide whether principles of fundamental fairness--stemming from the federal court's supervisory power--required the district court to apply its overruling decision prospectively only.

Conclusion

For these reasons, a writ of certiorari should be granted to review the judgment order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

GRETCHEN WHITE OBERMAN
Counsel for Petitioner

Dated: New York, New York
February 1, 1978

APPENDIX

Appendix A - Judgment Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2649

UNITED STATES OF AMERICA,

v.

THIES, WINTHROP DRAKE,

Appellant.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 76-182)

Argued
December 5, 1977
Before: ALDISERT and WEIS, *Circuit Judges,* and
CHRISTENSEN, *District Judge.* *

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the district court correctly held that the

* Honorable A. Sherman Christensen, of the United States District Court for the District of Utah, sitting by designation.

government agents illegally restrained appellant after his discharge from custody by the magistrate; (2) the district court erred (a) in ruling it could disregard the holding in *John Bad Elk v. United States,* 177 U.S. 529 (1900), (b) in not applying that law and dismissing pursuant to Rule 29, or (c) alternatively, in not instructing under the rule of law requested by appellant; (3) the district court erred (a) in ruling that agents are acting within the scope of their official duties if a jury could find they subjectively, and in good faith, believed their unlawful acts were authorized by law, (b) in not dismissing pursuant to Rule 29 on the ground that such actions are not protected by 18 U.S.C. § 111 or, (c) alternatively, in not instructing in accord with appellant's request; and (4) if the court overrules three hundred years of precedent, and holds there is no right to resist forcibly on the facts of this case, the new law should be applied prospectively only; and after considering this court's opinion in *United States v. Ferrone,* 438 F.2d 381 (3d Cir.), *cert. denied,* 402 U.S. 1008 (1971); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert

Circuit Judge

Appendix B - Judgment of the Court of Appeals in the Appeal From the Underlying Crime

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 77-1334 and 77-1388

UNITED STATES OF AMERICA

vs.

THIES, WINTHROP DRAKE,
Appellant in No. 77-1334

MARCUS, LEWIS,
Appellant in No. 77-1388

(D.C. Criminal No. 76-183-1 and 2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE -- DISTRICT OF NEW JERSEY

Present:

ALDISERT and WEIS, *Circuit Judges* and CHRISTENSEN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of New Jersey and was argued by counsel on December 5, 1977.

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* Honorable A. Sherman Christensen, of the United States District Court for the District of Utah, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 2, 1977, be, and the same are hereby vacated.

ATTEST:

_____

Clerk

January 23, 1978